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No. 95-992

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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REPLY BRIEF FOR APPELLANTS TURNER BROADCASTING SYSTEM, INC., *ET AL.*

Of Counsel:
BERTRAM W. CARP
TURNER BROADCASTING SYSTEM, INC.
820 First Street, N.E.
Washington, D.C. 20002
(202) 898-7680

(List of Counsel Continued on Inside Cover)

BRUCE D. SOKLER
Counsel of Record
CHRISTOPHER A. HOLT
TARA M. CORVO
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
(202) 434-7300

Counsel for Appellants Turner Broadcasting System, Inc.; A&E Television Networks; Black Entertainment Television, Inc.; E! Entertainment Television, Inc.; International Family Entertainment, Inc.; Lifetime Entertainment Services; National Cable Satellite Corp.; QVC, Inc.; The Travel Channel, Inc.; USA Networks; and Atlanta Interfaith Broadcasters, Inc.

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23 pp

(Of Counsel Continued)

ANNE S. ATKINSON
A&E TELEVISION NETWORKS
235 E. 45th Street
New York, NY 10017
(212) 661-4500

CELESTE M. MOY
BLACK ENTERTAINMENT TELEVISION, INC.
1900 W Place, N.E.
Washington, D.C. 20018
(202) 608-2000

MARK FELDMAN
E! ENTERTAINMENT TELEVISION, INC.
5670 Wilshire Boulevard
Los Angeles, CA 90036
(213) 954-2400

LOUIS A. ISAKOFF
INTERNATIONAL FAMILY ENTERTAINMENT, INC.
1000 Centerville Turnpike
Virginia Beach, VA 23463
(804) 523-7300

PATRICK W. GUY
LIFETIME ENTERTAINMENT SERVICES
309 W. 49th Street
New York, NY 10019
(212) 424-7000

BRUCE D. COLLINS
NATIONAL CABLE SATELLITE CORP. D/B/A C-SPAN
400 North Capitol Street, N.W.
Suite 650
Washington, D.C. 20001
(202) 737-3220

NEAL S. GRABELL
QVC, INC.
1365 Enterprise Drive
West Chester, PA 19380
(610) 701-1000

LOUIS F. RYAN
THE TRAVEL CHANNEL, INC.
2690 Cumberland Parkway
Suite 500
Atlanta, GA 30339
(770) 801-2400

STEPHEN A. BRENNER
USA NETWORKS
1230 Avenue of the Americas
New York, NY 10020
(212) 408-9100

JAMES H. JOHNSON
ATLANTA INTERFAITH BROADCASTERS, INC.
2000 M Street, N.W.
Suite 550
Washington, D.C. 20036
(202) 659-1911

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REPLY BRIEF FOR APPELLANTS TURNER BROADCASTING SYSTEM, INC., *ET AL.*

Appellants Turner Broadcasting System, Inc., *et al.* ("the cable programmers") respectfully submit this Reply Memorandum. Despite the mountains of paper to which the Government and the broadcasters refer the Court, and despite their final attempt to reposition the rationale for these must-carry rules, this case can be decided straightforwardly on a handful of key facts:

• In *Turner*, the plurality asked whether the Government could demonstrate that the economic health of local broadcasting is in genuine jeopardy and in need of must-carry's protections, *i.e.*, "that the recited harms are real, not merely conjectural. . . ."[1] Yet, between 1985 and 1992, when no must-carry rules were in effect, the total

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[1] *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2470 (1994).

number of television stations increased by 22%,[2] and not one of the nation's television markets had fewer commercial stations available over the air in 1992 than in 1981.[3] Furthermore, local stations that represented 98% of the viewing audience in *non-cable households* were carried by cable in the absence of must-carry (and over 30% of the stations without measurable ratings were carried as well).[4] Congress' finding that absent must-carry, local broadcasting would be jeopardized cannot withstand the scrutiny the First Amendment requires.[5]

• The plurality in *Turner* asked whether the must-carry rules suppress substantially more speech than necessary "to ensure the viability of broadcast television" by measuring must-carry's actual effects on cable operators and cable programmers. *Turner*, 114 S. Ct. at 2472. Approximately 50% of cable subscribers were served by cable systems that had been forced to add local television stations to comply with must-carry.[6] 67% of subscribers' systems had no available capacity.[7] Must-carry interfered with cable programmers' ability to compete for carriage in a limited channel environment. *Turner*, 114 S. Ct. at 2456, 2460.

• The *Turner* plurality inquired into the availability and efficacy of less restrictive means of achieving Con-

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[2] Declaration of Stanley M. Besen ("Besen Decl."), Exh. 5 (J.A. 850).

[3] *Id.* at 71 & Exh. 11 (J.A. 832 & 861). Indeed, three-fourths of the television markets had more stations. *Id.*

[4] *Id.* at 5, 28-29, 41-43 & Exh. 4 (J.A. 778, 797, 808 & 849).

[5] *See, e.g., Denver Area Educ. Telecommunications Consortium, Inc. v. FCC*, Nos. 95-124 & 95-227, slip op. at 30 (June 28, 1996); *id.* at 36-37 (Opinion of Breyer, J.).

[6] Declaration of Peter D. Shapiro ("Shapiro Decl."), Exh. 2 at 10-11, Table II-2 (J.A. 675).

[7] *Id.*, Exh. 1 at 9 (J.A. 662).

gress' interests. *Id.* at 2472. The record shows that much of the immediate new burden (86%) initially created by must-carry was attributable to Congress' unexplained broadening of the rules the FCC had adopted in 1987.[8] The record also shows that despite Congress' view that A/B switches would not work, they were pressed into use in Corpus Christi, Texas in response to an anti-competitive conspiracy by the broadcast stations,[9] and the stations still kept their audiences.

Hence, unless this Court were to conclude that any exercise of a cable operator's editorial discretion not to carry a broadcast station is to be prevented, *these* must-carry provisions on *this* record must fail. If the government interests identified in *Turner* are ever actually threatened, either the FCC or Congress stands ready to act.[10] If must-carry is upheld here, then the First Amendment's "overarching commitment to protect speech from Government regulation through close judicial scrutiny"[11] will have been overridden to provide an ever-expanding entitlement to a governmentally favored class of speakers.

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[8] Declaration of Gregory L. Klein, ¶¶ 25-26 (J.A. 1142-43).

[9] Affidavit of David J. Large ("Large Aff."), ¶ 71 (J.A. 1240); Notice, *United States of America v. Texas Tel., Inc., Gulf Coast Broadcasting Co., and K-Six Tel., Inc.*, Proposed Final Judgment and Competitive Impact Statement, 61 Fed. Reg. 6032 (Feb. 15, 1996) (prohibiting ABC, NBC and CBS affiliates from conspiring to increase the price of retransmission rights for a ten-year period).

[10] For example, in the 1996 Telecommunications Act, while eliminating the network-cable cross-ownership rules, Congress directed the FCC to revise regulations "if necessary" to ensure nondiscriminatory treatment of nonaffiliated broadcast stations by a network owned cable system, a much more tailored approach. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 111, § 202(f)(2).

[11] *Denver Area Educ.* at 11 (Opinion of Breyer, J.).

ARGUMENT

Although the Government and broadcasters attempt to debunk Judge Williams' thorough and careful analysis of the record, they make no effort to defend Judge Sporkin's opinion upholding the law. And they certainly make no attempt to justify the linchpin of his decision—his rejection that "the Court should examine the broadcasting industry *as a whole*" and his focus on "whether the health of those broadcasters protected by the must-carry provisions would be in jeopardy without the provisions." [12] As we said in our opening brief and repeat below, must-carry is not even narrowly tailored to that interest.

The Government's latest position is (1) to confuse evidentiary volume with persuasiveness, (2) to allege that cable operators have anticompetitive incentives, when the evidence does not reflect conduct consistent with the alleged incentives, (3) to belittle the harm to cable programmers imposed by must-carry, and (4) to defend the lack of tailoring in these rules by the rationale that more broadcast stations are always better. Our initial brief and Judge Williams' opinion have already anticipated and disposed of these claims, but we should assist the Court in removing the debris the law's defenders try to pile up.

I. THE GOVERNMENT HAS FAILED TO DEMONSTRATE THAT THE ECONOMIC HEALTH OF LOCAL BROADCASTING IS IN GENUINE JEOPARDY

A. At bottom, the Government has failed to meet its burden to demonstrate that must-carry is necessary to protect the "economic viability of free local broadcast television and its ability to originate quality local programming." [13]

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[12] *Turner Broadcasting System, Inc. v. FCC*, 910 F. Supp. 734, 741 n.11 (D.D.C. 1995) (emphasis in original).

[13] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, § 2(a)(16).

The Government never really could answer the fact that between 1985 and 1992, the period without must-carry protection, the number of full-power broadcasters did not decline, but increased by 22%, from 1235 to 1506.[14] Nor could it explain why broadcasting is imperiled when from 1980 to the present, not a single local television market has experienced a decrease in the number of commercial broadcast stations available over the air. And despite the mounds of arguments regarding cable operators' incentives to deny carriage to broadcasters, the historical record suggests otherwise. During the period without must-carry, cable systems carried local stations representing 98% of the viewing audience in non-cable households.[15] The stations carried did not represent only a few stations, as the Government contends (*see, e.g.*, Gov. Br. at 29), but encompassed 90% of all broadcast

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[14] Besen Decl., Exh. 5 (J.A. 850). The Government claims that this growth was "modest[]," and in fact signified a "five year downward trend" to Congress. Brief For The Federal Appellees ("Gov. Br.") at 34. The Government also claims that the growth occurred principally when the prior must-carry rules were in effect. However, as recognized by Judge Williams, there was a "net growth in stations *every* year" from 1981 to 1994 (*see Turner*, 910 F. Supp. at 764): an average net growth of 41 stations per year from 1986-1991, without must-carry, and an average growth of only 39.4 stations from 1981-1985, when a must-carry regime was in place. Judge Williams therefore concluded that "Congress could *not* have reasonably inferred from this that the industry was in decline or even in jeopardy of any material decline." *Id.* at 765 (emphasis in original).

[15] Besen Decl. at 5, 28 (J.A. 778, 797). Therefore, even if the Government's contention that cable carriage is vital to the continuing health of a local broadcaster is true (*see* Gov. Br. at 31-32), nearly all of the broadcasters watched by non-cable households received cable's support through carriage. Dr. Besen used 1994 Nielsen ratings data, which accounted for and eliminated the possibility that non-carriage of a broadcast station could have reduced a station's ratings in non-cable households. The FCC's prior must-carry rules gave new stations a maximum of one year to meet viewership standards, but Dr. Besen's analysis allowed stations nearly 18 month to attain ratings.

stations with any reportable ratings, and an additional 30% of those with no reportable ratings. Besen Decl. at 44, 53 (J.A. 809, 818).

B. Thus, unable to defend Congress' expressed purpose, the Government relies on alleged instances of non-carriage of a small number of broadcasters, which it abstractly characterizes as "substantial," and now argues that must-carry was designed to protect the "little watched" stations. Gov. Br. at 31-32. Notwithstanding the Government's improper recharacterization of Congress' interest in enacting must-carry, *see Edenfield v. Fane*, 113 S. Ct. 1792, 1798 (1993), the evidence regarding alleged denials of carriage actually reveals that the vast majority of broadcasters—and therefore the system of local broadcasting—was not in need of must-carry protection. Neither the FCC Carriage Survey [16] nor data developed on remand by its witness Mr. Meek—the two pieces of evidence on which the Government relies most heavily—supports the Government's claim that substantial numbers of small broadcasters were in danger of losing carriage to the extent that their financial health was at risk.

The FCC Carriage Survey provided information about broadcaster "drops" only in the form of raw data about the numbers of broadcasters not carried for any reason, and did not undertake to calculate whether these drops would have occurred if must-carry protections were in place. When the FTC Staff conducted this missing analysis, it found that fully 70% of the drops involved a network affiliate from an ADI different from that of the cable system, and were likely to be relatively remote stations that substantially duplicated the programming of another

[16] Staff Report, Policy and Rules Division of the Mass Media Bureau, *Cable System Broadcast Signal Carriage Survey Report* ("FCC Carriage Survey") (J.A. 36).

network affiliate.[17] Further, the FCC Carriage Survey itself found that 70% of the broadcasters had not been dropped or denied carriage by even a single cable system. FCC Carriage Survey, Table 3 (J.A. 50). In fact, 80% of the cable systems studied had not dropped or denied carriage to a single local broadcast station. *Id.*, Table 4 (J.A. 51). This Court has already found the FCC Carriage Survey inadequate to support must-carry's significant abridgement of cable programmers' and operators' First Amendment right to speak, even without the assistance of the FTC's evaluation.

The Government also relies on a study of carriage patterns developed after remand that asserts that the actual number of drops was higher than in the FCC Carriage Survey. Gov. Br. at 27 n.16. The argument is specious. First, Congress itself acknowledged that it "has not found that cable systems are engaging in a widespread pattern of denying carriage to local television stations." [18] Second, the Meek analysis again focuses on whether one operator failed to carry a station in the entire television market, without analyzing the much larger number of stations that were in fact carried or whether other systems carried the dropped stations. Moreover, the record demonstrates that two-thirds of the drops found in Meek's survey were not subsequently cured by the current must-carry requirements,[19] and hence cannot be blindly characterized as cable anticompetitive behavior. Finally, and most tellingly, none of this "evidence" responds to this Court's inquiry regarding the degree to which "local broadcast stations have fallen into bankruptcy, turned in their broadcast licenses, curtailed their broadcast operations, or suffered

[17] Reply Comment of the Staff of the Bureau of Economics and the San Francisco Regional Office of the Federal Trade Commission (filed Nov. 26, 1991) at 13-15 (J.A. 171-173).

[18] H.R. Rep. No. 628, 102nd Cong., 2d Sess. 52 (1992).

[19] Second Declaration of Stanley M. Besen at 12-13 (J.A. 1821-22.)

a serious reduction in operating revenues." *Turner*, 114 S. Ct. at 2472. The reason for this was immediately recognized by Judge Williams: appellees "have conceded their inability to show that *any* station, commercial or public, turned in its license in the period without must-carry." [20]

C. The Government's claim that absent must-carry, independent stations were denied access to 47% of their potential audience (Gov. Br. at 28) is terribly misleading. Most independent stations are UHF stations, which the Government acknowledges are more difficult to receive over-the-air. *Id.* at 42. Yet the calculations the Government sponsors by Dr. Rohlfs ignore the entire issue of whether the stations are actually viewable in the non-cable households. In fact, the FCC only attributes a UHF station as reaching one-half the television households in its market when administering its broadcast regulations.[21] Dr. Rohlfs' approach gives no weight to cable systems in markets with larger numbers of local stations, where a somewhat lower proportion of stations is usually carried. This approach biases the calculations in favor of finding a lower percentage. Moreover, Dr. Rohlfs conceded that our evidence showing that stations representing 98% of viewers were carried would be more probative if the inquiry were focused on the viewer rather than the broadcast station.[22] Under the First Amendment, it is the viewer's interest, not the station's, that is "paramount." [23]

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[20] *Turner*, 910 F. Supp. at 764 (Williams, J., dissenting).

[21] 47 C.F.R. § 73.3555(H). *See In the Matter of Amendment of § 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, Gen. Docket No. 83-1009 (rel. Feb. 1, 1985), ¶ 43 (discounting the UHF theoretical audience because "the fundamental limitation of UHF television involves its ability physically to reach viewers").

[22] Rohlfs' Rebuttal Decl., ¶ 11 (J.A. 1873).

[23] *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1453 (D.C. Cir.), *cert. denied*, 476 U.S. 1169 (1986).

Our approach is the appropriate one to determine whether the harms Congress saw were "real" or "conjectural."

D. The cable programmers contend that it is important to recognize that must-carry is not a one-time tsunami whose entire effects already have been felt. Must-carry was not invented in 1992. As the D.C. Circuit reviewed in great detail in *Quincy*, must-carry represented for nearly 20 years a foundation of economic protectionism for broadcast stations.[24] Having been reinstated in 1992, allegedly to preserve local broadcasting, Government-imposed mandatory carriage as a broadcaster entitlement continues to expand and entrench broadcasters as governmentally favored speakers:

• Congress and the FCC now have applied the must-carry provisions to open video systems created under the 1996 Telecommunications Act, to be operated primarily by telephone companies, even though the regulatory scheme for such systems would not have the same anti-competitive incentives that allegedly justify must-carry and even though there is no purported historical record of discrimination.[25]

• In our opening brief, we noted that the provisions at issue authorize the FCC to grant broadcasters must-carry status.[26] In the FCC's ongoing proceeding on advanced television systems, the Commission has proposed and broadcasters have advocated must-carry status for all broadcast stations, even when the programming is dupli-

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[24] *Id.* at 1442-43.

[25] *In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems*, CS Docket No. 96-46 (rel. June 3, 1996), ¶ 162. Congress provided no explanation of why these must-carry requirements were appropriate. *See* H.R. Rep. No. 458, 104th Cong., 2d Sess. 178 (1996).

[26] *See* Brief for Appellants Turner Broadcasting System, Inc. *et al.* ("Turner Br.") at 18.

cative, distinguished only by the technical format utilized for over-the-air delivery.[27]

If allowed to stand, must-carry status will be a new, additional Government entitlement for broadcasters that already receive free over-the-air spectrum. As Brian Lamb, Chairman and Chief Executive Officer of C-SPAN, testified in this case:

> Congress has decided that *anything* a holder of a broadcast license puts on the air is more important, relevant, useful, and generally good for society, and has a greater right to be seen, than anything C-SPAN puts on the air. Under the rule, C-SPAN and C-SPAN 2 take a back seat to every over-the-air broadcast shopping channel, every local religious channel (no matter how small its audience), every public station, and so on. If the cable operator still has room after fulfilling the demands of these "must carries," only then can our networks be considered for a channel slot. Congress has legislated second class status for us, with the preference going to any person holding a broadcast license.[28]

However, under heightened scrutiny, the First Amendment bars the Government from simply suppressing the speech of some in order to favor the speech of others.[29]

E. Contrary to the Government's assertions, we have never contended that the Government must prove that must-carry is "necessary to prevent the collapse of the *entire* broadcast industry." Gov. Br. at 9 (emphasis in original). We have said that Congress or the FCC would not have to wait until broadcasting is at death's door

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[27] *See* Broadcasters' Comments on the Fourth Notice of Proposed Rulemaking, *In The Matter Of Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, MM Docket No. 87-268 (filed Nov. 20, 1995) at 31-33.

[28] Declaration of Brian P. Lamb, ¶ 12 (emphasis in original).

[29] *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

(*see, e.g.*, Turner Br. at 31), but where local broadcasting is not threatened in *any* market, has not eroded in *any* market, and the number of stations has grown in two-thirds of the television markets, the Government has failed to meet its burden of sustaining these provisions under close First Amendment scrutiny.

II. THE HARM TO CABLE IS VERY REAL AND WILL NOT BE ALLEVIATED IN THE FORESEEABLE FUTURE

A. The Harm to Cable Programmers Is Not "Minimal."

The cable programmers presented substantial evidence of the types of harm must-carry regularly inflicts upon their efforts to convey speech to their intended audience. The Government does not dispute the fact that broadcasters *added* under must-carry occupy between 5600-6000 channels that are now permanently foreclosed as outlets for programmer speech.[30] As a consequence, 50% of cable subscribers now receive at least one television station added because of must-carry. Shapiro Decl., Exh. 2 at 10-11 (J.A. 675). Further, these channels represent only a fraction of the harm caused cable programmers: must-carry incumbents occupy an additional 30,000 channels nationwide. *Id.* at 16 (J.A. 681).

The Government acknowledges these injuries (*see* Gov. Br. at 36 & n.28), but asserts that because the number of broadcasters added was less than the number of broadcasters electing must-carry rights, the impact on programmers is necessarily "minimal." This argument has already been rejected by this Court, which recognized that the foreclosure of an equal opportunity to compete is a significant injury to programmers seeking to acquire carriage.[31]

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[30] *See* Shapiro Decl., Exh. 2 at 11 (J.A. 675); Meek Decl., ¶ 23 (J.A. 624).

[31] *Turner*, 114 S. Ct. at 2456. Further, must-carry is a continuously expanding burden on programmer speech (*see* Turner Br. at

Apart from its characterization of appellants' evidence as "negligible," the Government makes no effort of its own to ascertain the extent of harm. Instead, the Government continues its seemingly deliberate mischaracterization of the cable programmers' evidence and argues that the "total" number of instances of harm offered as evidence by the programmers does not represent "significant" harm. What this argument gets wrong is that we never attempted to introduce evidence of each and every event of must-carry injury,[32] and were under no court-directed order to do so.[33]

B. Capacity Increases Are Not a Defense.

By conceding that for the foreseeable future, demand for channel space will outstrip capacity,[34] the Government's own expert has rendered any disputes regarding capacity meaningless for First Amendment purposes. Where a First Amendment deprivation even for a short time is considered irreparable harm,[35] the prospect of foreclosure from channels needed to reach potential audiences for "the foreseeable future" renders any future relief irrelevant.

The Government contends that any capacity constraints that do exist are not due to the addition of must-carry

16-18). Because there is no cap on a system's must-carry obligations, there is no guarantee—indeed, it is unlikely—that the full effects of must-carry can be evaluated at this time.

[32] When enacting must-carry, Congress knew that the statute adversely affected cable programmers, but asserted erroneously that the injury had no constitutional implication. *See* H.R. 102-628 at 60-61.

[33] During discovery, the cable programmers were directed only to provide information regarding those instances about which they were considering presenting evidence. *See* Amended Scheduling Order (Jan. 30, 1995); Order of Special Master (Apr. 6, 1995).

[34] Deposition of Harry M. Shooshan III at 163 (J.A. 473).

[35] *See, e.g., Elrod v. Burns*, 427 U.S. 347, 373 (1976).

broadcasters. This argument is ineffectual for two reasons. *First*, the Government evidence of the amount of channel space foreclosed to programmers by must-carry is misleading. Although the Government contends that less than 1.2% of channel space is used by must-carry,[36] that figure represents only that amount occupied by broadcasters added pursuant to must-carry, and does not include the space permanently occupied by broadcasters that elected must-carry rights. Further, nationwide percentages such as those advanced by the Government are not helpful in analyzing the effects of must-carry in particular markets, because the statute's effects have not been felt evenly across the country. As Judge Williams recognized, "dozens of vacant channels on a handful of several-hundred-channel systems are obviously of no use to a constrained system of 50 channels that is forced to carry, for example, six must-carry stations." *Turner*, 910 F. Supp. at 780 n.23. For this reason, Judge Williams concluded that nationwide percentages are "meaningless as measures of the foreclosure effects of must-carry." *Id.*

Capacity increases will not alleviate the harm to programmer speech. Even the Government has withdrawn its assertion below that a capacity explosion is imminent, and now asserts only that technological advances will allow cable systems to increase capacity "to 80, 100, even 150 channels in the near future." Gov. Br. at 37-38. Where there are already over 165 cable programmers competing with broadcasters for channel space, however, the prospect of a 150-channel system sometime in the future does nothing to alleviate the cable programmers' First Amendment concerns.

Second, and perhaps more importantly, the addition of must-carry broadcasters does not have to be the only

[36] Gov. Br. at 36. The Government concedes in a footnote that must-carry occupies over 7% of the total channel capacity on cable systems. *Id.* at 36 n.28.

factor affecting a system's capacity in order for must-carry to diminish a cable programmer's opportunity for speech. Although the Government argues that cable systems have no available channels because they have added new cable programming, this argument misses the point. Regardless of what programming occupies other channels on a cable system, each channel occupied by a must-carry broadcaster is permanently foreclosed as a conduit for cable programmer speech. This Court recently reaffirmed that a lost opportunity to compete is itself an identifiable harm.[37] The must-carry statute has resulted in innumerable and continuing lost opportunities for cable programmers and operators to speak to their intended audiences. Nothing more is required.[38]

III. CONGRESS FAILED TO CONSIDER LESS RESTRICTIVE ALTERNATIVES THAT WOULD NOT HAVE RESULTED IN MUST-CARRY'S BURDEN ON CABLE SPEECH

Numerous alternatives existed that could have served Congress' interests equally effectively, one of which had been endorsed by the broadcasters as adequate to protect their interest in continued carriage.[39] While Judge Sporkin rejected these alternatives because none would protect as

[37] *See Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2105 (1995).

[38] Similarly, the fact that cable operators may have exercised their editorial discretion to fill new capacity with previously dropped programmers that are desired by cable audiences in no way reduces the harm to cable programmers. There is no guarantee that those programmers will not be dropped again, if a new broadcaster asserts must-carry rights. Further, such additions do not alleviate the harm suffered by the remaining programmers competing for space on cable systems that average 43 channels.

[39] For a discussion of additional alternatives not evaluated here in detail, such as antitrust or administrative complaint procedures and government subsidies, *see* Turner Br. at 58-60.

many broadcasters as must-carry,[40] this Court has made clear that the protection of individual broadcasters is not must-carry's goal. *Turner*, 114 S. Ct. at 2471-72. Further, any less restrictive alternative to must-carry's broad suppression of programmer speech would by definition cover fewer broadcasters. Without an evaluation that less restrictive means would not have achieved Congress' goals equally well, there can be no basis for the survival of this restriction on speech.

A. The Century Rules.

Congress had available to it a set of must-carry rules that were the product of a joint agreement between the broadcasting and cable industries, and had been adopted by the FCC: the *Century* rules.[41] The broadcasting industry had endorsed these rules as sufficient to protect broadcasters' interest in continued carriage, and the cable industry had found them to be an acceptable restriction on cable speech, yet Congress in 1992 enacted must-carry rules whose scope far exceeded that of those previously agreed upon.[42] There is no explanation in the record as to why the requirements of the *Century* rules would not have sufficed to protect Congress' asserted interest in preserving the availability of free television; in fact, no mention was made of the *Century* rules at all.

This Court recently reaffirmed that failure to consider a less restrictive alternative when important First Amendment interests are at stake can be fatal to a statute.[43] Further, this Court refused to hypothesize about conclusions Congress might have reached that were not clearly

[40] *See Turner*, 910 F. Supp. at 747.

[41] *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir.), *cert. denied*, 486 U.S. 1032 (1988).

[42] For detail concerning the expansion in scope of must-carry requirements occasioned by the 1992 Act, *see* Turner Br. at 19-20.

[43] *Denver Area Educ.* at 30.

set forth in the record.[44] Without explanation for why Congress deviated from the agreed-upon requirements of the *Century* rules, these must-carry rules restrict speech too greatly. *See id.*

B. A/B Switches.

A/B switches are an effective and viable alternative means for broadcasters not carried on cable to continue to reach cable households. The Government objects to A/B switches not on the basis of effectiveness, but on the grounds of cost and customer convenience. However, while the Government asserts that the cost can be "$250 in some cases" (Gov. Br. at 41), evidence from those in the industry showed that in the majority of cases, the necessary technology costs $10 or less. Large Aff., ¶ 22 (J.A. 1222). Further, experience has shown that in the only real-life widespread test of the A/B switch involving cable, cable households were willing and able to use A/B technology to receive broadcast signals over-the-air. The Government speculates, without any record evidence, that consumer willingness to use the A/B switch in the Corpus Christi market was dependent on its short-term nature. To the contrary, use of the A/B switch is likely to become more common, as use of new technologies that do not offer local broadcast signals, such as direct broadcast satellite television, becomes more widespread.[45]

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[44] *Id.* (emphasizing that "guesses about the comparative seriousness of the problem . . . are not legally adequate").

[45] *See Denver Area Educ.* at 15 (Opinion of Breyer, J.) (noting that direct broadcast satellites "already provide alternative ways for programmers to reach the home, and are likely to do so to a greater extent in the near future").

Another alternative to the burdens imposed by must-carry would have been the use of leased access channels. Given the very small number of broadcasters likely to be adversely affected by the absence of must-carry, nondiscriminatory access by this means would have been an effective and reasonable alternative for any

C. The Statute Is Not Narrowly Tailored.

Because insufficient numbers of broadcasters are in need of must-carry protection to justify a threat to the health and diversity of over-the-air broadcasting, because cable programmers are being denied significant opportunity for speech, and because other equally effective and less restrictive alternatives to must-carry exist, the must-carry statute fails the narrow tailoring test set forth by this Court. Must-carry is "overly restrictive, 'sacrificing' important First Amendment interests for too 'speculative a gain.' "[46]

Finally, if Congress' objective was actually to protect "marginal" stations, the must-carry statute is an ill-tailored mechanism to do so. Because a cable operator's must-carry obligation is capped at one-third of capacity, in television markets with many stations, an operator will not be required to carry all eligible stations. Which station will the operator choose not to carry? Undoubtedly, the marginal little watched or newer stations whose protection the Government claims is the objective of must-carry. This is therefore a case where in light of the "numerous and obvious less burdensome alternatives" that exist, the fit is constitutionally unreasonable.[47]

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broadcaster desiring cable carriage. The Government argues that this alternative reduces only the burden on programmer speech, not operator speech (Gov. Br. at 46), but itself points out elsewhere that Congress may act in one way to rectify injury to one group, while acting differently to rectify related injury to another group (*see id.* at 17 n.4), leaving no argument against this alternative that would alleviate much of the harm to the cable industry caused by must-carry.

[46] *Denver Area Educ.* at 30, *quoting Columbia Broadcasting System, Inc. v. Democratic Nat'l Committee*, 412 U.S. 94, 127 (1973).

[47] *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1510 n.13 (1993), *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1593-94 (1995).

CONCLUSION

The decision of the district court should be reversed.

Respectfully submitted,

BRUCE D. SOKLER
Counsel of Record
CHRISTOPHER A. HOLT
TARA M. CORVO
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
(202) 434-7300
Counsel for Appellants
Turner Broadcasting System,
Inc., et al.

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